Supreme Court, U.S.
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No. 96-1608

In The

Supreme Court of the United States

October Term, 1996

CLINTON TRIMIEW,

Petitioner,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

JOHN S. BARR
Counsel of Record
FRANK C. MALONEY, III
FRED R. KOZAK
MALONEY, BARR
& HUENNEKENS
A Professional Corporation
Attorneys for Respondent
NationsBank Center
1111 East Main Street
Suite 800
Richmond, Virginia 23219
(804) 644-0313

71151 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTION PRESENTED

Whether the Supreme Court of Virginia correctly ruled that, under applicable principles of FELA actions, petitioner failed as a matter of law to present sufficient evidence to raise a jury issue on the question of respondent's negligence?

RULE 29.6 LISTING

Respondent's parent corporation is Norfolk Southern Corporation. Respondent's subsidiaries are: Airforce Pipeline, Inc.; Alabama Great Southern Railroad Company, The; Algers, Winslow and Western Railway Company; Atlantic and East Carolina Railway Company; Augusta and Summerville Railroad Company; Beaver Street Tower Company; Camp Lejeune Railroad Company; Central of Georgia Railroad Company; Central Transfer Railway and Storage Company; Chatham Terminal Company; Chesapeake Western Railway; Cincinnati, New Orleans and Texas Pacific Railway Company, The; Citico Realty Company; Georgia Southern and Florida Railway Company; High Point, Randleman, Asheboro and Southern Railroad Company; Interstate Railroad Company; Lamberts Point Barge Co., Inc.; Memphis and Charleston Railway Company; Mobile and Birmingham Railroad Company; Norfolk and Portsmouth Belt Line Railroad Company; Norfolk and Western Railway Company; North Carolina Midland Railroad Company, The; North Carolina Railroad Company; North Charleston Terminal Company; Rail Investment Company; Shenandoah-Virginia Corporation; Railbox Company; Railgon Company; South Western Rail Road Company, The; Southern Rail Terminals, Inc.; Southern Rail Terminals of North Carolina, Inc.; Southern Region Coal Transport, Inc.; Southern Region Materials Supply, Inc.; Southern Region Motor Transport, Inc.; State University Railroad Company; Tennessee, Alabama & Georgia Railway Company; Tennessee Railway Company; Terminal Railroad Association of St. Louis; TTX Company; Virginia and Southwestern Railway Company; Woodstock & Blocton Railway Company; Yadkin Railroad Company.

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45 U.S.C. § 51, *et seq.* 1, 8

Respondent Norfolk Southern Railway Company (NS) respectfully requests this Court to deny the petition for writ of certiorari seeking review of an opinion of the Supreme Court of Virginia. The Virginia Supreme Court's opinion is reported at 253 Va. 22, 480 S.E. 2d 104 (Va. 1997). For the convenience of the Court, all citations to the opinion below will be to the opinion included at pages 1-9 of the Appendix to the petition.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Petitioner filed this action against NS under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, *et seq.*, seeking damages for personal injuries. Petitioner alleged that he hurt his back on August 20, 1993, when he stepped out of a high rail inspection vehicle and slipped on ungroomed ballast rock lining an area of railroad track.

The motion for judgment was filed on February 28, 1995, and served on March 2, 1995. The case was tried on December 7 and 8, 1995 before a jury in the Circuit Court for the City of Richmond, Virginia. The jury returned a verdict for petitioner in the amount of $500,000. NS moved to set aside the verdict on the grounds that there was no evidence that it was negligent, and that the injury was caused solely by petitioner's own negligence. The trial court denied this motion, and on December 11, 1995 entered an order granting judgment to petitioner in accordance with the jury's verdict.

On December 13, 1995, NS filed a motion for the trial court to reconsider its earlier motion to set aside the verdict.[1] NS also

1. Petitioner notes that NS did not move to challenge the evidence of negligence until after the verdict. Under Virginia law, a defendant has the (Cont'd)

moved the trial court to vacate the jury's verdict, or grant a remittitur. After a hearing on December 19, 1995, the trial court denied these motions.

NS appealed the trial court's rulings to the Supreme Court of Virginia. The Virginia Supreme Court granted an appeal, but only as to whether the evidence was sufficient to present a jury issue on the question of NS's negligence. On January 10, 1997, the Virginia Supreme Court issued its opinion ruling that petitioner's evidence was insufficient as a matter of law to raise a jury issue that NS was negligent. Accordingly, the Virginia Supreme Court reversed and entered final judgment for NS.

B. Statement of Facts and Correction of Misstatements in Petition.

Petitioner worked for NS as a track laborer for over twenty years. At the time of this incident, petitioner was assigned to accompany assistant track supervisor Robert Forsythe on his regular trips inspecting approximately sixty miles of track from Burkeville to Richmond, Virginia. These inspections were made in a "high rail" vehicle, a regular truck with retractable runners that allows the vehicle to ride on the railroad tracks.

On August 20, 1993, petitioner and Forsythe were in a high rail vehicle inspecting an area of open track outside Burkeville. Forsythe stopped the vehicle to clear a small tree from near the tracks. While dismounting the vehicle from the passenger side, petitioner slipped and fell on ballast rock lying along the tracks.

(Cont'd)
option of testing the sufficiency of the evidence by a motion to strike the plaintiff's evidence, or by moving to set aside the jury's verdict. *See Gabbard v. Knight*, 202 Va. 40, 43, 116 S.E. 2d 73, 75 (1960). NS's strategy in exercising this option should not be misconstrued as a favorable comment on the strength of petitioner's evidence of negligence.

Ballast rock is stone that is put down to stabilize and hold the track in place. It is also sloped to provide drainage. [App. at 31, 39]. Periodically, the railroad must replace old cross ties and resurface track sections in what is called a timbering and surfacing (T&S) operation. A T&S operation is a large undertaking involving numerous pieces of equipment. It must be scheduled and planned for months in advance. Before a scheduled T&S operation, ballast rock that will be used in the operation is unloaded along the sides of the track. The ballast is unloaded through doors on both sides of a multi-car train as it moves slowly down the track. When properly unloaded along areas of open track, the ballast is laid out in a berm eight to twelve inches above the level of the track. [App. at 126].

The ballast rock remains built-up alongside the track until the T&S operation comes through, which may be a period of months after the ballast is unloaded. After the old cross ties are replaced in the T&S operation, a machine called a ballast regulator comes down the track and smooths or "grooms" the ballast to the prescribed profile. [App. at 126-127]. The proper profile after the ballast is regulated is called a full standard ballast section. The ballast in a standard section extends six inches out from the edge of the cross tie, and then slopes down to the ground. The ballast is generally groomed level with the cross ties. [App. at 113-114]. NS has standard procedures on track stability and ballast that apply to these operations. [App. at 124-125].

In this case, ballast was unloaded along an approximately six mile stretch of track beginning in Burkeville and running north toward Richmond. The ballast was unloaded in March 1993, in advance of a T&S operation later that summer. [App. at 127]. In open track areas, the ballast was laid out in a berm about eight to ten inches above the rail. [App. at 134]. When they reached road crossings and switches, the workers tried to

close the doors on the train so that ballast was not dumped in those areas. [App. at 37]. A switch is an area where the track goes from one type to another; on this particular area of track from main line to various types of siding. [App. at 133]. Forsythe and petitioner were required to make walking inspections at all switches monthly, and weekly inspections of the switch compromise bars — a joint bar where the track goes from one size to another. [App. at 132-133]. Trainmen also were required to dismount in those areas to throw the switch. Accordingly, the amount of ballast in switch areas was slight. [App. at 133].

In April or May, 1993, track supervisor Steve Palmer learned that the T&S operation would not be coming through that summer as planned. [App. at 116]. As a result, the ballast remained built up along the tracks at the time petitioner slipped in August.

Petitioner presented evidence that during the summer of 1993, a ballast regulator was located on a side track at nearby Crewe, Virginia. A number of laborers qualified to operate the regulator testified that it would have taken approximately one day to groom the section of unloaded ballast. [App. at 32-33, 83].

Palmer testified that a ballast regulator was not available in the district during that period of time, and that he would have had to schedule a ballast regulator through his supervisor. [App. at 116-117]. Forsythe testified that a ballast regulator may have been in the district or an adjacent district during some of the time, but it may have had mechanical problems, and if used, would have been used on small jobs in more highly trafficked areas. [App. at 138-139].

Forsythe further testified that the ballast along the tracks at the time of petitioner's fall was not improper in relation to the

railroad's standard policies and procedures governing ballast and track stability. Forsythe said that a period of several months, in this case five months, was well within the normal time frame that ballast would be unloaded in anticipation of a T&S operation. [App. at 127-128].

Petitioner wrongly states that unloaded ballast was normally regulated within a month. [Petition at 6]. Petitioner himself testified that most of the time it was usually a month or two before the T&S operation came through and regulated the ballast. [App. at 95]. An employee witness called by petitioner testified that the ballast could be on the ground about two or three months before the T&S operation. [App. at 51]. Petitioner's evidence further established that during the time before the T&S operation came through, the unloaded ballast remained built up along the track. [App. at 40, 102-103].

Petitioner, together with Forsythe and other employees, participated in the ballast unloading in March 1993. It was common for track laborers to help unload ballast; petitioner said he had probably done it more than six or seven times before. [App. at 102]. In his twenty years working on the railroad, petitioner had walked on ungroomed ballast after it was unloaded, and he knew that it was more difficult to walk on than regulated ballast. [App. at 101]. Palmer observed that all ballast is difficult to walk on. [App. at 115].

Palmer testified that several months before the incident, he used a large gang truck to demonstrate to the employees the proper way to mount and dismount equipment. He demonstrated how to dismount facing the equipment, and maintaining three points of contact (two hand holds and a foot hold) until one foot was securely on the ground. Palmer said he told the men that this was the proper method to mount and dismount all equipment. [App. at 119-120]. Petitioner admitted he was present at the

demonstration, but said that he did not hear any reference to "three points of contact." Petitioner also said he did not hear Palmer say this procedure was to be used on all equipment. [App. at 104-105].

Petitioner's evidence was that Palmer never demonstrated dismounting from a high rail vehicle in particular, and that Palmer did not use the phrase "three points of contact" until after petitioner's accident. One employee, however, testified that when he got out of a high rail vehicle, he would get out backwards, facing the truck. [App. at 54]. He said NS had not instructed him to do that — common sense simply told him that was the safest way. [App. at 54].

Between March and August 1993, petitioner frequently rode through the area where the ballast was unloaded as part of his job assisting Forsythe with track inspection. Normally, track inspections were scheduled twice a week. During the summer, inspections were made daily to monitor the effects of heat on the rails. [App. at 132].

On the day he fell, petitioner and Forsythe stopped at a few switches in the Burkeville area. Petitioner testified there were no mounds of ballast around the switches. [App. at 86]. When they reached the spot where Forsythe stopped to clear the small tree from the tracks, petitioner looked down at the ground before dismounting the high rail vehicle and saw the ballast along the track. He said it looked safe to get out. [App. at 88]. Petitioner then stepped out of the vehicle facing forward with only one hand on the vehicle at the time his foot slipped on the ballast. [App. at 103-104].

Petitioner testified that he knew the ungroomed ballast was in the area that he fell, but that he had never stopped before at that particular spot. He had only stopped at switches. [App. at

96]. Indeed, petitioner slipped in an area of open track that was not a place where workers would often walk. [App. at 139].

In his petition, petitioner repeatedly states that the unloaded ballast was frozen and came out in chunks; and that there were large, uneven piles of ungroomed ballast along the track. Petitioner never testified at trial, however, about any unusual piles or chunks of ballast in the area where he fell. Moreover, petitioner took a picture of "pretty much the exact area" where he fell. [App. at 91]. No unusually high piles or mounds of ballast are visible. The picture shows a continuous, even berm of ballast at the proper height for ungroomed ballast.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR WITH THE WELL-SETTLED PRINCIPLES OF FELA ACTIONS.

This case presents no important question for the Court to decide. The proceeding below is merely an example of the Virginia Supreme Court exercising its right under the FELA to determine, as a matter of law, whether the petitioner's evidence of negligence on the part of NS was sufficient to justify submitting the case to a jury. *See Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-480 (1943). This is a factual determination that varies from case to case and "is of no doctrinal importance." *Id.* at 480.

After reviewing the facts and the law under the FELA, the Virginia Supreme Court held that the petitioner's evidence was insufficient as a matter of law to raise a jury issue on the question of NS's negligence. Petitioner argues that this holding is a ruse.

According to petitioner, the Virginia Supreme Court really based its decision on the ground that petitioner assumed the risk of his injury. Knowing assumption of risk is an impermissible defense under the FELA, petitioner argues, the Virginia Supreme Court concealed its true grounds for decision behind a finding that NS was not negligent in the first place. To make this argument, the petitioner distorts the opinion below and previous opinions of this Court.

Petitioner argues that in the cases of *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943) (*Tiller I*) and *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945) (*Tiller II*), this Court caught the Fourth Circuit Court of Appeals doing what petitioner accuses the Virginia Supreme Court of doing here, namely, using a finding of "no negligence" as a synonym for assumption of risk. Neither the Fourth Circuit nor the Virginia Supreme Court employed the subterfuge petitioner charges.

This Court granted certiorari in *Tiller I* because of important questions involved in the Court of Appeals' interpretation of the scope and effect of the then recently enacted amendment to § 4 of the FELA (the "Amendment"). The Amendment provided that employees shall not be held to have assumed the risks of employment where injury or death resulted in whole or in part from the employers' negligence. In analyzing the Court of Appeals' decision, this Court found that the Circuit Court attempted to distinguish between two types of assumption of risk: (1) assumption of risk as a defense by employers who themselves had been negligent in the first instance; and (2) assumption of risk in the sense that the employer was not negligent at all for failing to protect employees from ordinary risks of the business, because the employee assumed those risks. *Tiller I* at 57. The Court of Appeals interpreted the Amendment as eliminating assumption of risk as a defense in cases where the employer had been negligent, but preserving the doctrine of assumption of risk to negate negligence on the part of the employer for injuries due to ordinary risks. *Id.*

This Court rejected a dichotomy that treated assumption of risk "sometimes as defense to negligence, and sometimes as the equivalent of non-negligence." *Id.* at 58. This Court held that the Amendment was intended to eliminate the doctrine of assumption of risk in FELA cases, and the Amendment "did not mean to leave the identical defense for the master by changing its name to 'non-negligence'." *Id.*

While making it clear that the Amendment abolished the doctrine of assumption of risk in FELA cases, this Court recognized that liability under the FELA still requires an initial finding of employer negligence that was the proximate cause of an employee's injury. *Tiller I* at 67. Justice Frankfurter thought that misinterpretation of the Amendment resulted from loose usage of the phrase "assumption of risk." As Justice Frankfurter explained in his concurring opinion, the proper interpretation of the FELA is that once negligence on the part of the defendant is established, the defendant cannot be relieved of liability by pleading that the employee "assumed the risk." *Tiller* at 71. On the other hand, the FELA leaves intact negligence as the foundation for the defendant's liability. *Id.*

Justice Frankfurter observed that the FELA did not create a system of worker's compensation, unconcerned with whether there was negligence on the part of the employer. Instead, Congress chose to liberalize the law of negligence by abolishing traditional common law defenses based on the conduct of the employee (such as assumption of risk), once the employer's negligence is established. *Id.*

On remand, the plaintiff in *Tiller I* amended her FELA complaint by adding an alternative theory of liability. Plaintiff's decedent was struck by rail cars being pushed backward by a locomotive. The new claim alleged that the locomotive did not have a rear light, in violation of the Federal Boiler Inspection

Act (FBIA). *See Atlantic Coast Line R. Co. v. Tiller*, 142 F.2d 718 (4th Cir. 1944). The jury returned a general verdict against the defendant that did not specify whether liability was found under the FELA or the FBIA. On appeal, the Circuit Court examined whether there was sufficient evidence to submit the FBIA claim to the jury. The Circuit Court held that even if failure to provide the rear light was a violation of the FBIA, the plaintiff failed to prove that this was the proximate cause of the accident. The Circuit Court reasoned that because the cars being pushed toward the decedent would have obscured any light on the rear of the locomotive, the light would not have been visible to the decedent in any case. *Id.* Accordingly, the Circuit Court reversed the jury verdict.

In *Tiller II*, this Court reversed the Court of Appeals on the ground that the jury could have found that a light on the rear of the locomotive may have given the decedent some warning, even if obscured by the cars. Accordingly, this Court held that both charges of negligence were jury issues.

This Court found an additional ground for reversal in *Tiller II*. The trial court instructed the jury that if they believed the back-up movement of the locomotive was unusual, unexpected and a departure from the usual practice, and that decedent had no reasonable cause to believe the movement would be made, then it became the duty of the railroad to give him an adequate warning of the movement. Despite finding that the back-up movement was unusual, however, the Circuit Court ruled the railroad had no duty to warn. The Circuit Court reached this conclusion because no railroad rule or custom prohibited the unusual movement, there was some evidence that the same movement had occurred on other occasions, and the decedent was familiar with the local situation.

This Court disagreed with the Circuit Court's conclusion,

but not because the Circuit Court improperly ruled on the basis of assumption of risk. Rather, this Court said that the jury could reasonably have found that the backing movement of the locomotive was such an unprecedented departure from the usual practice that the railroad may have been negligent for not providing adequate warning of the movement. *Tiller II* at 580. Accordingly, the duty to warn was also a jury question.

Importantly, the Court in *Tiller II* approved the trial court's instruction as a correct statement of the law. *Id.* Under that instruction, the duty to provide an adequate warning arose only after it was found that the back-up movement of the locomotive was unusual, and that the decedent had no reasonable cause to anticipate it. This statement of the law does not support petitioner's broad pronouncement that the *Tiller* cases impose a blanket duty on railroads to warn employees of "even customary dangers." [Petition at 10]. Petitioner apparently forgets that the FELA does not make the railroad the insurer of workers' safety, nor does it impose the duty to provide an absolutely safe workplace. The FELA does not impose on employers the burden of removing every potential risk from the workplace. Nor does the FELA impose a duty to warn employees of ordinary dangers of which they are already aware. *See Baez v. Southern Pacific Co.*, 26 Cal. Rptr. 899 (Cal. App. 1963) (railroad had no duty to warn or instruct an experienced carman of dangers in installing a dome car window that required no particular skill but only ordinary intelligence and physical strength).

In his attempt to capture this Court's attention, petitioner glosses over the principles stated in the *Tiller* cases. Certainly, the FELA eliminates as a defense for the negligent employer any conduct of the employee in assuming the risk of his injury. The decisions of this Court confirm, however, that employer liability is predicated on a showing of negligence, defined as the failure to exercise due care under the circumstances. In

determining whether sufficient evidence of negligence exists to present a jury question, a court must consider the totality of the circumstances, including the nature of the activity involved in the accident, any applicable rules or procedures, as well as the experience and knowledge of the employee. Consideration of these factors does not improperly inject assumption of risk issues into the court's decision. Instead, these factors bear on whether or not the employer exercised ordinary care in a particular case.

The Virginia Supreme Court fully recognized and properly stated the applicable principles of the FELA which govern this case. The opinion below states these principles, which were embodied in two recent cases in which the Virginia Supreme Court also properly found lack of negligence on the part of a railroad. *See Stover v. Norfolk and Western Ry. Co.*, 249 Va. 192, 455 S.E. 2d 238, *cert. denied*, __ U.S.__, 116 S. Ct. 186 (1995); *Norfolk and Western Ry. Co. v. Hughes*, 247 Va. 113, 439 S.E. 2d 411, *cert. denied*, __ U.S.__, 114 S. Ct. 2136 (1994). In this case, the Virginia Supreme Court recognized a railroad's duty to exercise reasonable care in furnishing its employees a safe place to work. The opinion below also recognized that railroads must conduct proper inspections to discover dangers in places where employees are required to work, and must take reasonable precautions for the employees' safety after determining the existence of such dangers. The opinion properly noted, however, that even under the FELA, a railroad must be guilty of some act of negligence, however slight, before an injured employee can recover. Furthermore, the Virginia Supreme Court correctly stated that reasonable foreseeability of harm is an essential element of FELA negligence.

II.

THE VIRGINIA SUPREME COURT CORRECTLY DECIDED THAT PETITIONER'S EVIDENCE FAILED AS A MATTER OF LAW TO RAISE A JURY ISSUE ON THE QUESTION OF RESPONDENT'S NEGLIGENCE.

The Virginia Supreme Court carefully analyzed the facts presented in this case in reaching its conclusion that petitioner failed to carry his burden of establishing negligence on the part of NS. Petitioner failed to present any evidence that the condition of the ballast rock at the time of his fall violated any rule or standard with regard to ungroomed ballast. The ballast on the day that petitioner fell was in the same condition as it was the day after it was unloaded from the train. According to petitioner's own evidence, it was not unusual for unloaded ballast to remain unregulated for up to three months before a T&S operation. Everyone agreed that ungroomed ballast was difficult to walk on. As the Virginia Supreme Court observed, however, petitioner presented no evidence that the ballast presented an unknown or unreasonable danger. [App. at 7-8].

Descriptions of the ballast as "excessively high" and "dangerous" are figments of petitioner's argument — there is no testimony or other evidence in the record that the ungroomed ballast where petitioner fell was unusual or dangerous. Petitioner tries to manufacture a dangerous condition by arguing that "frozen chunks" or lumps of stone created "huge piles" of ballast. But petitioner presented no evidence at trial that this condition existed where he fell. The opinion below noted that petitioner's photo of the "exact area" of the fall did not show ballast lying in "chunks and lumps", but only a smooth, constant mound of ballast piled along the rails. [App. at 7].

On page 11 of his petition, petitioner quotes "key language"

from the opinion below that purportedly reveals the presence of assumption of risk issues in the decision. In the quoted language, the Virginia Supreme Court observes that the ballast where petitioner fell was the proper height for ungroomed ballast, that workers like petitioner were "fully aware" of the condition of the ballast from long experience and from participating in the ballast unloading, and that the workers and petitioner knew the ungroomed ballast was difficult to walk on. But consideration of these facts does not demonstrate reliance on assumption of risk; rather, as the opinion states, these facts lead to the conclusion that "there was no basis for the defendant to foresee that the ballast, laid in routine fashion for miles along track in open country, posed an unreasonable danger to employees such as plaintiff." [App. at 8]. In other words, these facts go to the question of reasonable foreseeability of harm, a requirement of negligence under the FELA. Furthermore, reasonable foreseeability is determined by what should have been anticipated at the time; it is not determined by hindsight based on what has happened. *See Taylor v. Missouri Pacific R.R. Co.*, 510 S.W. 2d 735 (Mo. App. 1974).

The Virginia Supreme Court also properly considered NS's need to perform maintenance by unloading ballast along the track. As the Virginia Supreme Court noted, it would be an unreasonable burden to require NS to regulate unloaded ballast within a specified period of time. According to petitioner's theory, the unregulated ballast is a constant danger. Under that theory, petitioner must argue that if he had stepped out onto the ballast a month after it was unloaded, or perhaps even a day after it was unloaded, NS would have been liable. This untenable argument would require NS to regulate the ballast as soon as it is unloaded, even in remote areas of open track where a worker may seldom, if ever, go.

The duty imposed on the employer must be commensurate

with the risk. *See Tiller I*, at 67. Throughout his petition, petitioner refers to the ungroomed ballast as a "known danger", and even states that NS "never really contested" that petitioner had proven a dangerous condition as a result of the ballast. [*See* Petition at 14]. That is false. NS like everyone else acknowledged that ungroomed ballast is difficult to walk on. But NS consistently maintained that the ballast in this case did not pose an unreasonable danger to workers such as petitioner. The Virginia Supreme Court agreed. [App. at 8].

In this case, if the ballast had been regulated as petitioner contends it should have been, it is fair to say that NS would have had to repeat the unloading process when the T&S operation was rescheduled.[2] The Virginia Supreme Court found that was an unreasonable burden under these circumstances. Certainly, NS could not have reasonably foreseen the need to regulate the ballast in open track areas, given the nature of the potential risk involved.

The Virginia Supreme Court correctly noted that the other ballast cases cited by petitioner are factually different from this case. *See Atlantic Coast Line R.R. Co. v. Gunter*, 229 F.2d 842 (5th Cir. 1956); *Hahn v. Norfolk and Western Ry. Co.*, 375 N.E. 2d 914 (Ill. App. 1978); *Harp v. Illinois Central Gulf R.R. Co.*, 370 N.E. 2d 826 (Ill. App. 1977). The most notable difference

2. Petitioner suggests that redumping the ballast would not have been necessary, because the ballast regulator could be used to push the rock down or pull it up as needed. [Petition at fn. 2, p. 7]. The testimony cited by petitioner, however, was a description of the regulating process in which the witness said that the arms of the regulator could pull the rocks in or push them out to get a nice flow of ballast. [App. at 32]. This would be done, however, while the ballast was built up around the rail. There was no testimony that a regulator could be used as a substitute for the ballast unloading process. If that is the case, one wonders why the railroad would go through the laborious and presumably expensive exercise of dumping the ballast in the first place.

is *Gunter*, which occurred in a trafficked switch yard, as opposed to the open track where petitioner's mishap occurred. In *Harp*, plaintiff fell on ballast that was not properly tamped down after old ties were replaced. In *Hahn*, plaintiff slipped while closing a heavy door without assistance, an unusually difficult task that could not have been done differently, and had to be done on ballast that the plaintiff could not have known would roll under his feet while he was performing the task. None of these circumstances applies to petitioner.

Finally, petitioner argues that the Virginia Supreme Court erroneously declined to consider his argument that NS failed to instruct him or provide written rules on the safe way to dismount a high rail vehicle. As noted in the opinion below, the petitioner never plead this particular theory of negligence. [App. at 9]. Petitioner seeks to bootstrap this theory into the case through his general allegations of failure to warn and failure to provide a safe workplace. It really doesn't matter, however, whether failure to instruct made its way into the case, either through liberal interpretation of the pleadings or lack of objection at trial. Petitioner did not submit a jury instruction that would have led the jury to base its verdict on a failure to instruct theory. Petitioner's jury instruction on negligence was aimed at the theory that NS was negligent for failing to regulate the unloaded ballast. [App. at 161, Instruction No. 10]. Indeed, while petitioner relies heavily on a failure to warn theory in his petition, that theory also was not the subject of an instruction to the jury.

In summary, the Virginia Supreme Court's decision in this case is based on a proper interpretation of the common law and the principles of the FELA. The decision is not based on any hidden finding that petitioner assumed the risk of his injury. This is simply a case where the proof failed to raise a jury issue on negligence. Contrary to petitioner's assertions, this case involves no conflict with this Court's prior decisions and reaches no result inconsistent with proper federal law standards under the FELA.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN S. BARR
Counsel of Record
FRANK C. MALONEY, III
FRED R. KOZAK
MALONEY, BARR
& HUENNEKENS
A Professional Corporation
Attorneys for Respondent
NationsBank Center
1111 East Main Street
Suite 800
Richmond, Virginia 23219
(804) 644-0313